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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Wells Fargo Bank NA, et al.,

No. CV-13-01475-PHX-DGC

Plaintiffs,

SUPPLEMENTAL ORDER

V.

Breakwater Equity Partners LLC, et al.,

Defendants.

On April 23, 2015, the Court issued an order granting Plaintiff's motion for summary judgment. Doc. 216. Specifically, the Court found Defendants Breakwater Equity Partners, LLC ("Breakwater") and Thompson National Properties, LLC ("TNP") had converted \$605,000 in Rents generated from a commercial property owned by Plaintiff. *Id.* at 15. In light of the ruling, the Court ordered the parties to submit a joint memorandum describing the issues remaining in the case. *Id.* at 16-17.

In the joint memorandum, the parties notified the Court that several Defendants, referred to as the “Borrowers,” had been dismissed from the action by Plaintiff. Doc. 217 at 2. In addition, the parties agreed that the Court had found TNP and Breakwater liable for conversion, but disputed whether the order resolved the amount of compensatory damages. *Id.* Thereafter, TNP filed a motion to determine the comparative fault among it, Breakwater, and the remaining non-parties at fault. Doc. 222. Breakwater filed a memorandum disputing the amount of compensatory damages and arguing that the

1 Court's order left this issue open for trial. Doc. 226. Plaintiff argued that it had
 2 requested a specific sum of compensatory damages in their motion for summary
 3 judgment. Doc. 187. It further argued that TNP and Breakwater are jointly and severally
 4 liable for the entire amount. Doc. 225.

5 The Court has considered the parties' briefs and concluded that the facts
 6 underlying the amount of compensatory damages are undisputed and Plaintiff did in fact
 7 seek summary judgment on this issue. *See* Docs. 187, 188 at 5-6. This order will
 8 supplement the Court's summary judgment ruling (Doc. 216) and award \$605,000 in
 9 compensatory damages to Plaintiff.

10 The only issue remaining in the case is whether Defendants are subject to joint and
 11 several liability or comparative fault.¹ As this issue arose only recently as a result of
 12 settlements with other defendants, the Court will permit a final round of summary
 13 judgment briefing on this issue before proceeding to trial.

14 **I. Compensatory Damages.**

15 Plaintiff filed this action to recover \$605,000 in Rents generated from its
 16 commercial property. The Court has concluded that Breakwater and TNP are liable for
 17 conversion of those Rents. The following facts are undisputed and taken from the
 18 Court's April 23, 2015 order.

19 Over a period of four months, TNP made nine transfers of Rents to Breakwater,
 20 totaling \$2,306,250. Doc. 189, ¶¶ 72-82; Doc. 193, ¶ 9. TNP also made two transfers to
 21 its own account totaling \$48,750. Doc. 189, ¶¶ 77, 80. Thus, in total, \$2,355,000 in
 22 Rents were transferred from Plaintiff's Operating Account to Defendants. *Id.*, ¶ 2. In
 23 August 2014, Plaintiff and Borrowers, who have since been dismissed from this action,
 24 entered into a Settlement Agreement under which Borrowers directed transfer of

25
 26 ¹ All four counts alleged in the second amended complaint have been addressed.
 27 The Court found in favor of Plaintiffs on count 1, which was brought against TNP and
 28 Breakwater. Plaintiffs have voluntarily dismissed count 2, which was alleged against
 Breakwater and the Borrowers, as well as counts 3 and 4, which were brought against the
 Borrowers/Guarantors. Docs. 170, 218, 219. Plaintiff also dropped its punitive damages
 claim against Defendants. Doc. 223.

1 \$1,750,000 of Rents remaining in Breakwater’s accounts to Plaintiffs. Doc. 193, ¶ 13.
 2 Consequently, \$605,000 in converted Rents remains outstanding.

3 Breakwater argues that only \$2,306,250 was transferred to its accounts. This is
 4 true – but an additional \$48,750 was transferred out of Plaintiff’s Operating Account to
 5 TNP as its fee. As noted above, \$2,355,000 in total Rents were converted by Defendants.
 6 This does not create a question of fact for the jury.

7 Breakwater also argues that several payments were made to it as “fees” and were
 8 held in unsegregated accounts. It asserts that at least one transfer was made to a third
 9 party. But these arguments overlook the Court’s finding that Plaintiff was immediately
 10 entitled to “all Rents” contained in the Operating Account. At that point in time, any
 11 subsequent transfers by Defendants to anyone other than Plaintiff constituted conversion.
 12 The Court also noted that Defendants did not dispute that, prior to the acts of conversion,
 13 the Rents were kept in segregated, identifiable accounts. Doc. 216 at 15-16. This is
 14 sufficient to establish that the proceeds were identifiable for a claim of conversion. *See*
 15 *id.* at 12-13 (noting that the “Rents were kept in separate accounts”). Contrary to
 16 Breakwater’s argument, Plaintiff need not provide evidence “tracing” the exact
 17 movement of the Rents after they were transferred.

18 Because the facts underlying the amount of Plaintiff’s damages are undisputed, the
 19 Court will award Plaintiff \$605,000 in compensatory damages for the outstanding amount
 20 of converted Rents.

21 **II. Liability.**

22 TNP moves for the Court to “enter an order setting for trial before the trier of facts
 23 the determination of damages and the respective liabilities of each of the joint defendants
 24 and non-parties at fault.” Doc. 222 at 3. Under Arizona law, “the liability of each
 25 defendant is several only and is not joint[.]” A.R.S. § 12-2506(A). Generally,
 26 comparative fault principles apply, and “[e]ach defendant is liable only for the amount of
 27 damages allocated to that defendant in direct proportion to that defendant’s percentage of
 28 fault[.]” *Id.* There is an exception – Defendants may be held jointly liable if they “were

1 acting in concert.” *Id.* § 12-2506(D)(1). “‘Acting in concert’ means entering into a
2 conscious agreement to pursue a common plan or design to commit an intentional tort
3 and actively taking part in that intentional tort.” *Id.* § 12-2506(F)(1).²

4 Because this issue arose only recently, it was not raised in the parties’ motions for
5 summary judgment. Rather than proceeding immediately to trial on this single issue, the
6 Court concludes that the parties should file a final set of summary judgment briefs to see
7 if it can be resolved as a matter of law. If not, a trial will be scheduled.

8 **IT IS ORDERED:**

- 9 1. Plaintiff is awarded \$605,000 in compensatory damages.
10 2. TNP’s motion to determine comparative fault (Doc. 222) is **denied**.
11 3. The parties shall brief, under Rule 56, whether Defendants are jointly and
12 severally liable for Plaintiff’s damages or are subject to comparative fault.
13 The parties shall simultaneously file 10-page memoranda on this issue by
14 August 28, 2015, and 5-page replies by September 4, 2015.

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16 Dated this 14th day of August, 2015.

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20 _____
21 David G. Campbell
22 United States District Judge
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27 ² Ariz. R. Civ. P. 26(b)(5) requires that a party who alleges that another “person or
28 entity not currently or formerly named a party was wholly or partially at fault” must
identify the party and the basis for the allegations of fault within 150 days of that party’s
answer. Here, however, the Borrowers were not dismissed until after the Court’s
April 23, 2015 order. Therefore, the timeliness of TNP’s request is not an issue.